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9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE DISTRICT OF OREGON

11 PEGGY J. HALLAS, )  
12 )  
13 Plaintiff, )  
14 )  
15 v. )  
16 )  
17 AMERIQUEST MORTGAGE COMPANY, )  
18 a Delaware corporation, )  
19 FIDELITY NATIONAL TITLE IN- )  
20 SURANCE COMPANY, a California )  
corporation, and DEUTSCHE BANK )  
NATIONAL TRUST COMPANY, a )  
NATIONAL ASSOCIATION, TOWN & )  
COUNTRY TITLE SERVICES, a )  
California corporation, )  
Defendants. )

No. CV-04-433-HU

OPINION & ORDER

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23 Attorney for Plaintiff

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27 Attorney for Defendants

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1 - OPINION & ORDER

1 HUBEL, Magistrate Judge:

2 Plaintiff Peggy Hallas brings this action regarding a  
3 nonjudicial foreclosure and subsequent sale of her real property.  
4 She brings the following claims against the following defendants:  
5 (1) claims under the Truth in Lending Act (TILA) against defendants  
6 Ameriquest Mortgage Company and Deutsche Bank National Association;  
7 (2) a claim under the Fair Debt Collection Practices Act (FDCPA)  
8 against Fidelity National Title Insurance Company and Town &  
9 Country Title Services; (3) a claim under Oregon's Unfair Trade  
10 Practices Act against Ameriquest; (4) a claim of slander of title  
11 against Fidelity and Deutsche Bank; (5) a claim to remove cloud on  
12 title against Deutsche Bank; (6) a claim for breach of contract  
13 against Ameriquest and Fidelity; and (7) a claim for declaratory  
14 relief against Ameriquest, Fidelity, and Deutsche Bank seeking a  
15 declaration that Ameriquest did not have a valid Deed of Trust or  
16 that the foreclosure and deed to Deutsche Bank was not done in  
17 accordance with applicable law.

18 In an August 24, 2005 Opinion & Order, I denied plaintiff's  
19 motion for partial summary judgment on the declaratory relief claim  
20 and I granted defendants' cross-motion for summary judgment on the  
21 same claim. I concluded that the Deed of Trust was subject to  
22 reformation based on mutual mistake or a scrivener's error. After  
23 reforming the deed, there was no basis for plaintiff's argument  
24 that the deed violated the statute of frauds. I also concluded  
25 that pursuant to Washington law, plaintiff waived her right to  
26 challenge the defective legal property description in the default  
27 notice by failing to object to it before the foreclosure sale.  
28 Thus, I concluded that there was no basis for a declaration that

1 the trustee's sale was wrongful and void and that plaintiff was  
2 still the lawful owner of her property.

3 Defendants now move for summary judgment on the remaining  
4 claims. Plaintiff moves to amend her Complaint to add a breach of  
5 fiduciary duty claim. Additionally, plaintiff requests that I  
6 reconsider my previous determination on the reformation issue.<sup>1</sup>  
7 All parties have consented to entry of final judgment by a  
8 Magistrate Judge in accordance with Federal Rule of Civil Procedure  
9 73 and 28 U.S.C. § 636(c). I deny plaintiff's motion to amend and  
10 I grant defendants' motion. I further deny plaintiff's request for  
11 reconsideration.

#### 12 BACKGROUND

13 The background of the dispute is set forth in detail in the  
14 August 24, 2005 Opinion & Order. Any additional relevant facts are  
15 incorporated into the discussion below.

#### 16 STANDARDS

17 Summary judgment is appropriate if there is no genuine issue  
18 of material fact and the moving party is entitled to judgment as a  
19 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the  
20 initial responsibility of informing the court of the basis of its  
21 motion, and identifying those portions of "'pleadings, depositions,  
22 answers to interrogatories, and admissions on file, together with  
23 the affidavits, if any,' which it believes demonstrate the absence  
24 of a genuine issue of material fact." Celotex Corp. v. Catrett,

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26 <sup>1</sup> Plaintiff's reconsideration request was not filed as a  
27 formal motion but was included in her memorandum in opposition to  
28 defendants' summary judgment motion. The parties have treated  
the request as a motion, as do I.

1 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

2 "If the moving party meets its initial burden of showing 'the  
3 absence of a material and triable issue of fact,' 'the burden then  
4 moves to the opposing party, who must present significant probative  
5 evidence tending to support its claim or defense.'" Intel Corp. v.  
6 Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991)  
7 (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th  
8 Cir. 1987)). The nonmoving party must go beyond the pleadings and  
9 designate facts showing an issue for trial. Celotex, 477 U.S. at  
10 322-23.

11 The substantive law governing a claim determines whether a  
12 fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors  
13 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as  
14 to the existence of a genuine issue of fact must be resolved  
15 against the moving party. Matsushita Elec. Indus. Co. v. Zenith  
16 Radio, 475 U.S. 574, 587 (1986). The court should view inferences  
17 drawn from the facts in the light most favorable to the nonmoving  
18 party. T.W. Elec. Serv., 809 F.2d at 630-31.

19 If the factual context makes the nonmoving party's claim as to  
20 the existence of a material issue of fact implausible, that party  
21 must come forward with more persuasive evidence to support his  
22 claim than would otherwise be necessary. Id.; In re Agricultural  
23 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);  
24 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,  
25 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

## 26 DISCUSSION

### 27 I. Defendants' Motion for Summary Judgment

28 Defendants move for summary judgment on all of plaintiff's

1 remaining claims on the basis that plaintiff has waived her right  
2 to bring those claims in this action by failing to assert them  
3 before the foreclosure sale. Alternatively, defendants contend  
4 that summary judgment is warranted for reasons particular to each  
5 claim, as further discussed below.

6 A. Waiver

7 The law regarding waiver is discussed in the August 24, 2005  
8 Opinion & Order. Aug. 24, 2005 Op. & Ord. at pp. 16-17. I  
9 incorporate that discussion here. Relying on Washington statutory  
10 and case law, I concluded in the August 24, 2005 Opinion & Order  
11 that plaintiff waived any right to contest the defective property  
12 description in the notice of default because she received notice of  
13 the right to enjoin the sale, she had actual or constructive  
14 knowledge of a defense to foreclosure prior to the sale, and she  
15 failed to bring an action to obtain a court order enjoining the  
16 sale. Id.

17 Presently, defendants argue that the waiver recognized by  
18 Washington law includes the waiver of any defenses to default or  
19 challenges to the underlying obligations for which foreclosure is  
20 sought. That is, defendants contend that by failing to act before  
21 the foreclosure sale, plaintiff has waived her right to assert any  
22 claims arising out of the underlying obligations created by her  
23 mortgage with Ameriquest and the Complaint should be dismissed in  
24 its entirety.

25 In support of their argument, defendants rely on In re  
26 Marriage of Kaseburg, 126 Wash. App. 546, 108 P.3d 1278 (2005),  
27 Steward v. Good, 51 Wash. App. 509, 754 P.2d 150 (1988), and  
28 Peoples Nat'l Bank v. Ostrander, 6 Wash. App. 28, 491 P.2d 1058

1 (1971).

2 In Kaseburg, a wife in a divorce proceeding alleged that her  
3 husband had committed fraud, waste, and other financial misconduct  
4 in regard to real property that they had previously owned and thus,  
5 she should be awarded her community interest in that property.  
6 Kaseburg, 126 Wash. App. at 549, 108 P.3d at 1280. The couple had  
7 lived in the home, but had borrowed extensively from the husband's  
8 parents for the building of the home and other living expenses.  
9 Id. Before the marriage dissolution, the couple executed an  
10 \$850,000 promissory note and deed of trust on the home in favor of  
11 the husband's parents. Id. After the couple separated, but before  
12 the dissolution trial, the husband's parents initiated a  
13 foreclosure action under the Washington Deed of Trust Act on the  
14 note and deed of trust. Id. The wife received a notice of  
15 default. Id. She then received a notice of trustee's sale. I  
16 She did nothing to contest the sale. Id. The home was foreclosed  
17 upon with the sale occurring just prior to the dissolution trial.  
18 Id. at 551, 108 P.3d at 1281. The husband's parents were the  
19 successful bidders and took title to the home. Id.

20 Although by the time the dissolution trial took place, the  
21 home was not an asset to divide, the wife nonetheless argued that  
22 she had been the victim of fraud by the husband, that the  
23 promissory note was fraudulent and inflated, and that the husband  
24 had wasted and mishandled community assets. The trial court ruled  
25 in favor of the wife. Id. at 554-55, 108 P.3d at 1283.

26 The appellate court reversed. The court recognized that in a  
27 dissolution proceeding, the trial court can exercise its equitable  
28 powers and evaluate whether a party wasted or concealed community

1 assets. Id. at 558, 108 P.3d at 1285. But, the court said, this  
2 was not an issue of waste, but was one of foreclosure of a debt  
3 secured by the deed of trust and thus, was governed by the Deed of  
4 Trust Act. Id. Notably, the court stated that the Act provides  
5 the sole method to contest and enjoin a foreclosure sale under  
6 Wash. Rev. Code § (RCW) 61.24.130(1). "A person waives the right  
7 to contest the underlying obligations on the property in  
8 foreclosure proceedings when there is no attempt to employ the  
9 presale remedies under RCW 61.24.130." Id.

10 The court stated that the wife did not dispute that she  
11 received notice of the default, that the notice complied with the  
12 Deed of Trust Act, and she did not contest the foreclosure  
13 proceedings in any manner. Thus, she waived the opportunity to  
14 contest the underlying debt as fraudulent and the opportunity to  
15 contest the transfer of the property to the husband's parents. Id.  
16 at 559, 108 P.3d at 1285. Because the debt shown in the promissory  
17 note and the community interest in the home were legally  
18 extinguished in the foreclosure sale, the amount of the debt and  
19 the value of the property were not before the trial court for  
20 valuation or distribution in the dissolution proceeding. Id.

21 In Steward, the property at issue had been sold to a third  
22 party at a nonjudicial foreclosure sale. Following the sale, the  
23 previous owners brought an action to quiet title in their favor,  
24 arguing that the trustee failed to strictly comply with the  
25 statutory prerequisites of the Deed of Trust Act. The appellate  
26 court described the issue as whether, and under what circumstances,  
27 a party may obtain post-sale relief from a trustee's sale, where  
28 the subject real property has been sold to third party strangers to

1 the original transaction. Steward, 51 Wash. App. at 512, 754 P.2d  
2 at 152. The court agreed with the purchasers that once there is a  
3 purchase by an established bona fide purchaser, there may be no  
4 post-sale relief for alleged irregularities in the sale. Id.

5 The court explained that the Stewards waived any right to  
6 contest the trustee's sale by their failure to pursue the presale  
7 remedies provided in the Act. Id. at 515, 754 P.2d at 154. There  
8 was no dispute that they had actual notice of the sale. Each of  
9 their objections to the sale was or should have been known by them  
10 before the sale and they failed to bring an action to restrain the  
11 sale. Id. The court stated that "courts will not allow a grantor  
12 to delay asserting a defense to the default until after the sale  
13 because it would defeat the spirit and intent of the trust deed  
14 act." Id. at 516-17, 754 P.2d at 154 (internal quotation omitted).

15 Finally, in Peoples National Bank, the purchaser of property  
16 at a nonjudicial foreclosure trustee's sale brought an unlawful  
17 detainer action against the grantors of the trust deed to obtain  
18 possession of the real property. Peoples Nat'l Bank, 6 Wash. App.  
19 at 29, 491 P.2d at 1059. The grantors filed an answer and cross-  
20 complaint alleging that the deed of trust was obtained by fraud  
21 because the plaintiff had represented that the document the  
22 defendant signed was a mortgage and not a deed of trust. Id. at  
23 30, 491 P.2d at 1059-60.

24 The court affirmed the trial court's striking of the  
25 defendants' fraud claim because under the Washington Deed of Trust  
26 Act, the defendant had notice of the sale and knew that the  
27 document was a trust deed and not a mortgage, yet failed to bring  
28 an action to restrain the sale and litigate the issue of fraud



1 before the sale. Id. at 32, 491 P.2d at 1060. The court explained  
2 that allowing the defendant to delay asserting his defense of fraud  
3 until late in the proceedings would defeat the spirit and intent of  
4 the Deed of Trust Act. Id. Because the Deed of Trust Act gave the  
5 defendant an adequate remedy at law, he could not assert the fraud  
6 argument as an equitable defense to the unlawful detainer action.

7       These cases show that whether the claim is a defect in a  
8 procedural or other requirement of the Deed of Trust Act itself  
9 (such as in the default notice), or is a challenge to the  
10 underlying obligation (such as fraud claims), the waiver provision  
11 of the Deed of Trust Act applies to prevent the borrower/grantor  
12 from raising such claims when the borrower/grantor has notice of  
13 the claim before the sale, has notice of the sale, and fails to  
14 initiate litigation to stop the sale.

15       Moreover, the language of the Deed of Trust Act is quite  
16 broad, indicating that the waiver provision applies to both  
17 challenges to the pre-foreclosure process and challenges to the  
18 underlying obligation. E.g., RCW 61.24.130(1) ("Nothing contained  
19 in this chapter shall prejudice the right of the borrower, grantor,  
20 any guarantor, or any person who has an interest in, lien, or claim  
21 of lien against the property or some part thereof, to restrain, on  
22 any proper ground, a trustee's sale.") (emphasis added); RCW  
23 61.24.040(1)(f)(IX) ("Anyone having any objection to the sale on  
24 any grounds whatsoever will be afforded an opportunity to be heard  
25 as to those objections if they bring a lawsuit to restrain that  
26 sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit  
27 may result in a waiver of any proper grounds for invalidating the  
28 Trustee's sale.") (emphasis added).

1 Defendants accurately describe plaintiffs' remaining claims as  
2 being related to the execution of the trust deed or to the  
3 foreclosure. The TILA claims are based on allegations that  
4 Ameriquest allegedly failed to provide required disclosures  
5 including the total finance charge, the amount financed, and the  
6 annual percentage rate of interest. Compl. at ¶¶ 39-46. The  
7 Oregon trade practices claim is based on an alleged TILA violation.  
8 Plaintiff bases the Oregon claim on an administrative rule  
9 providing that it is an unfair or deceptive trade practice under  
10 Oregon law for a person to advertise, offer credit, or extend  
11 credit related to the purchase of real estate, goods, or services  
12 in violation of TILA. Id. at ¶¶ 47-48.

13 The FDCPA claim is based on alleged contacts of plaintiff by  
14 Fidelity and Town & Country for the purposes of collecting. Id. at  
15 ¶¶ 49-54. Plaintiff also alleges that Fidelity used a name other  
16 than its own in making these contacts. Id. at ¶ 52. The breach of  
17 contract claim is based on the Deed of Trust. In that claim,  
18 plaintiffs alleges that the Deed of Trust was a contract and that  
19 Ameriquest breached the contract by declaring plaintiff in default,  
20 which plaintiff contends was excused by virtue of the alleged TILA  
21 violations. Id. at ¶¶ 63-68. That is, she alleges that she was  
22 not in default because of Ameriquest's alleged earlier failure to  
23 provide her with all of the required disclosures under TILA. Id.  
24 She also alleges that the other defendants breached the Deed of  
25 Trust by not foreclosing on her property in accordance with  
26 applicable Washington law. Id.

27 The TILA claims, the Oregon trade practices claim, and the  
28 breach of contract claim all assert alleged violations in the

1 execution of the Deed of Trust, violations that could have provided  
2 a basis for restraining the foreclosure. The FDCPA claim, and to  
3 a certain extent the breach of contract claim, asserts improper  
4 conduct in the execution of the foreclosure proceedings, before the  
5 actual sale, and also could have provided a defense to the  
6 foreclosure. There is no dispute that plaintiff had actual or  
7 constructive knowledge of the bases of her claims before the  
8 foreclosure sale occurred.

9 As established in the August 24, 2005 Opinion & Order,  
10 plaintiff received notice of the trustee's sale along with notice  
11 of her right to enjoin the sale. She obviously failed to bring any  
12 action to stop the sale before the sale occurred, raising her  
13 claims only later in this action. She had actual or constructive  
14 knowledge of her alleged defenses to foreclosure prior to the sale.  
15 Under Washington law, she has waived her right to bring these  
16 claims in this action.

17 Before turning to defendants' alternative arguments which I  
18 discuss briefly below, I address plaintiff's assertions that  
19 Fidelity did not have the right to sell the property and that  
20 Fidelity did not have authority to act as a Trustee under  
21 Washington law. Aside from the fact that these arguments, just  
22 like the claims in her Complaint, are subject to the waiver  
23 provision in the Deed of Trust Act, her arguments have no merit.

24 Plaintiff first contends that the Deed of Trust appointed  
25 Ticor as trustee, not Fidelity, and thus, Fidelity had no authority  
26 to sell the property. Exh. 1 to Compl. at pp. 1, 2, (showing Ticor  
27 Title Insurance as Trustee). However, the record shows that an  
28 Appointment of Successor Trustee was executed on June 20, 2003,

1 because Ticor resigned as trustee and Fidelity National Title  
2 Insurance of Washington was appointed as successor trustee under  
3 the trust deed. Exh. 1 to Oct. 17, 2005 Affid. of Gaby Ospino.  
4 The Appointment of Successor Trustee was recorded in Clark County  
5 on July 7, 2003. Id.

6 Next, plaintiff contends that Fidelity lacked authority to act  
7 as a trustee in the State of Washington. Washington law provides  
8 that the trustee of a deed of trust may be any "title insurance  
9 company authorized to insure title to real property under the laws  
10 of this state[.]" RCW 61.24.010(1)(b).

11 According to evidence submitted by defendants, the website  
12 maintained by the State of Washington Insurance Commissioner lists  
13 Fidelity National Title Insurance as an authorized title insurance  
14 company in the State of Washington. Oct. 17, 2005 Jacobson Declr.  
15 at ¶ 3; Exh. 1 to Oct. 17, 2005 Jacobson Declr. Defendants also  
16 provide evidence that Fidelity's main branch in Washington is  
17 located at 3500 188th Street, SW, Suite 300, Lynnwood, Washington  
18 98037-4760. Exh. 2 to Jacobson Oct. 17, 2005 Declr. Defendants  
19 suggest that the reference in the Appointment of Successor Trustee  
20 to "Fidelity National Title Insurance of Washington" was simply a  
21 short-handed reference to Fidelity National Title Insurance Company  
22 located in Lynnwood.

23 Additionally, at oral argument, defendants tendered an  
24 additional exhibit from the State of Washington Insurance  
25 Commissioner which shows that Fidelity National Title Company of  
26 Washington, located at the Lynnwood, Washington address noted  
27 above, is an active and authorized title insurance company in  
28 Washington. Exh. 2 to Oct. 27, 2005 Jacobson Declr. Plaintiff

1 indicated she opposed consideration of the exhibits tendered by  
2 defendants during oral argument based on lack of authentication.  
3 Plaintiff was given leave to file a written submission on this  
4 issue but failed to do so. I interpret this as a waiver of  
5 plaintiff's objection and I consider the exhibit. Defendants'  
6 evidence establishes that contrary to plaintiff's argument,  
7 Fidelity National Title Company of Washington is an entity and is  
8 an authorized title insurer in the State of Washington.  
9 Accordingly, it is an authorized trustee for a deed of trust under  
10 RCW 61.24.010(1)(b).

11 B. Defendants' Alternative Arguments

12 1. TILA Claims

13 TILA requires that any claim based on an alleged failure to  
14 make material disclosures be brought within one year from the date  
15 of the occurrence of the violation. 15 U.S.C. § 1640(e); King v.  
16 State of Calif., 784 F.2d 910, 915 (9th Cir. 1986). The  
17 limitations period runs from the date of consummation of the  
18 transaction. Id. The record shows that this alleged TILA  
19 violation occurred on November 22, 2002, the date the transaction  
20 was consummated, and thus, under the limitations period, plaintiff  
21 was required to file this TILA claim no later than November 23,  
22 2003. The Complaint was filed on March 25, 2004. This TILA claim  
23 is time-barred.

24 The other TILA claim seeks rescission based on the  
25 nondisclosure of documents. The relevant law for a claim of  
26 rescission based on an alleged TILA violation provides that "an  
27 obligor's right of rescission shall expire three years after the  
28 date of consummation of the transaction or upon the sale of the

1 property, whichever occurs first[.]" 15 U.S.C. § 1635(f). In this  
2 case, the foreclosure sale has terminated plaintiff's right of  
3 rescission. Thus, even if plaintiff had not waived her TILA claims  
4 by failing to bring them before the foreclosure, both of them are  
5 time-barred.

## 6 2. Oregon Trade Practices Act Claim

7 In the August 24, 2005 Opinion & Order, I concluded that  
8 Washington law applies to this dispute. Aug. 24, 2005 Op. & Ord.  
9 at pp. 7-9. Defendants contend that as a result of that  
10 conclusion, plaintiff cannot prevail on an Oregon statutory claim.  
11 Although plaintiff originally argued that the choice of law  
12 discussion and conclusion in the August 24, 2005 Opinion & Order  
13 was limited to the issue of the validity of the deed and the  
14 foreclosure, plaintiff conceded during oral argument that the  
15 Oregon law did not apply because all of the relevant acts occurred  
16 in Washington.

## 17 3. FDCPA Claim

18 For the reasons explained in Hulse v. Ocwen Federal Bank, FSB,  
19 195 F. Supp. 2d 1188. 1202-04 (D. Or. 2002), I agree with  
20 defendants that Town & Country's and Fidelity's actions were taken  
21 as part of a foreclosure on a trust deed and not as part of  
22 collecting a debt under the FDCPA.

## 23 4. Breach of Contract Claim

24 As noted above, the breach of contract claim pleaded in the  
25 original Complaint has two components. The first is that  
26 Ameriquest breached the Deed of Trust by declaring plaintiff to be  
27 in default when any default was, according to plaintiff, excused by  
28 Ameriquest's alleged TILA nondisclosure violations. Second,

1 plaintiff contends that defendants breached the Deed of Trust by  
2 not foreclosing on the property in accordance with applicable  
3 Washington law.

4 As to the first basis, I agree with defendants that a TILA  
5 claim which is otherwise waived or barred, cannot support the  
6 breach of contract claim. As to the second basis of the claim, I  
7 agree with defendants that I already ruled in the August 24, 2005  
8 Opinion & Order that the foreclosure was not invalid.

9 5. Claims for Slander of Title and  
10 Removal of Cloud on Title

11 Plaintiff concedes that if the reformation of the Deed of  
12 Trust stands, these claims should be dismissed.

13 I grant defendants' summary judgment motion because plaintiff  
14 received notice of the trustee's sale with the required notice of  
15 her right to enjoin the sale, had knowledge of her defenses to the  
16 foreclosure, and failed to bring an action to stop the foreclosure,  
17 and thus, she has waived her right to bring the claims in this  
18 action. Alternatively, defendants are entitled to summary judgment  
19 on each of the claims remaining in the Complaint for the individual  
20 reasons discussed here.

21 II. Plaintiff's Request for Reconsideration

22 Plaintiff offers no new law or facts in support of her request  
23 of the reformation issue. Thus, she fails to raise a valid basis  
24 for reconsidering my earlier decision. Transp. Credit Serv. Ass'n  
25 v. Systran Fin. Servs. Corp., No. CV-03-1342-MO, 2004 WL 1920799,  
26 at \*1 (D. Or. Aug. 26, 2004) ("There are three primary grounds  
27 justifying granting a motion to reconsider: (1) an intervening  
28 change in controlling law, (2) the availability of new evidence,

1 and (3) the need to correct clear error or prevent manifest  
2 injustice.") (citing Medford Pacific v. Danmor Constr., 2 F. Supp.  
3 2d 1322, 1323 (D. Or. 1998)); see also 766347 Ontario Ltd. v.  
4 Zurich Capital Mkts, Inc., 274 F. Supp. 2d 926, 929 (N.D. Ill.  
5 2003) ("Motions to reconsider are not at the disposal of parties  
6 who want to rehash old arguments [and] are not appropriate vehicles  
7 to advance arguments already rejected by the Court[.]") (internal  
8 quotation and bracket omitted).

9       However, even reconsidering the issue and the arguments  
10 plaintiff puts forth in her reconsideration request, I adhere to my  
11 prior ruling. Plaintiff initially argues that defendants' reliance  
12 on Berg v. Ting, 125 Wash. 2d 544, 886 P.2d 564 (1995), is  
13 misplaced. But, defendants' reliance on Berg was primarily for the  
14 basic and uncontested proposition of Washington law that an  
15 agreement containing an inadequate legal description is void and  
16 not subject to reformation unless the deficient legal description  
17 is caused by a scrivener's error or mutual mistake in which case  
18 the agreement may be reformed before assessing its validity under  
19 the statute of frauds. Id. at 554, 886 P.2d at 570. It was not  
20 inappropriate for defendants to cite to Berg for that statement of  
21 the law. Defendants also discussed Berg in more detail in support  
22 of a "part performance" argument. But, since I did not address or  
23 rely on that argument in the August 24, 2005 Opinion & Order, there  
24 is no basis for plaintiff seeking reconsideration based on  
25 defendants' reliance on this aspect of Berg.

26       Next, plaintiff contends that under Williams v. Fulton, 30  
27 Wash. App. 173, 632 P.2d 920 (1981), the Deed of Trust was not  
28 subject to reformation. There, the court stated that although a



1 legal description of property may be reformed if a mutual mistake  
2 is established, a "mutual mistake occurs only if the intention of  
3 the parties was identical at the time of the transaction, and the  
4 written agreement did not express that intention." Id. at 176-77,  
5 632 P.2d at 923. "Reformation is not appropriate . . . if the  
6 agreement expresses the intent of the parties, but the legal  
7 description is merely incomplete." Id.

8 Plaintiff argues that accepting her version of the facts as  
9 true, the summary legal description supposed to be in the Deed of  
10 Trust, and Exhibit A to the Deed of Trust containing the full legal  
11 description of the property, were blank and absent at the time of  
12 signing. Thus, she argues, the Deed of Trust expressed the intent  
13 of the parties but had an incomplete legal description. Under  
14 Williams, she maintains, the Deed of Trust is not subject to  
15 reformation.

16 I find Williams distinguishable. First, the Williams court  
17 recognized that reformation based on mutual mistake was properly  
18 applied to the part of the earnest money agreement which mistakenly  
19 included a description of property the seller had previously sold  
20 to an unrelated party. Id. at 177 n.3, 632 P.2d at 921 n.3. Under  
21 defendant's version of the facts where both the summary legal  
22 description and the full legal description were contained in and  
23 attached to the Deed of Trust, the legal description was not  
24 incomplete, but mistakenly recited the wrong log number, and  
25 reformation based on mutual mistake is appropriate under Williams.

26 Second, even under plaintiff's version of the facts, a  
27 completely absent legal description, as she alleges here, is  
28 distinct from an incomplete legal description as was at issue in

1 Williams. Thus, the facts as set forth in detail in the August 24,  
2 2005 Opinion & Order demonstrate that the parties in the instant  
3 case had the identical intent at the time of signing, but the  
4 written agreement, by allegedly omitting any reference to a summary  
5 or a complete legal description, did not express the parties'  
6 intent. Thus, under the law as stated in Williams, reformation by  
7 mutual mistake is appropriate.

8 This is supported by the Key Design case cited in the August  
9 24, 2005 Opinion & Order where the land sale document at issue  
10 completely omitted the legal description of the property and the  
11 court undertook to analyze whether the agreement was subject to  
12 reformation based on mutual mistake. Key Design, Inc. v. Moser,  
13 138 Wash. 2d 875, 883-84, 983 P.2d 653, 659, amended, 993 P.2d 90  
14 0 (1999). The court found that the sellers of the property did not  
15 intend to include a legal description of the property in the sale  
16 agreement because they did not intend that agreement to be binding,  
17 but instead viewed it as a step in the negotiation process. Id. at  
18 889, 983 P.2d at 661. With that testimony, the court concluded  
19 that it could not reform the agreement based on mutual mistake  
20 because the evidence did not demonstrate that the parties'  
21 intentions were identical at the time of the transaction. Id.

22 In the August 24, 2005 Opinion & Order, I noted that while the  
23 Key Design court ultimately concluded, based on the facts before  
24 it, that there was no mutual mistake, the case still stood for the  
25 proposition that a land sale document which completely omits a  
26 legal description may be reformed based on mutual mistake in the  
27 presence of evidence of identical intent. Upon reconsideration, I  
28 still conclude that this is a sound reading of Key Design.

1 Finally, plaintiff relies on Sea-Van Investments Associates v.  
2 Hamilton, 71 Wash. App. 537, 861 P.2d 485 (1993), rev'd, 125 Wash.  
3 2d 120, 881 P.2d 1035 (1994). In that case, the plaintiff sought  
4 specific performance of an alleged land sale contract based on an  
5 exchange of letters between the parties. The trial court granted  
6 the defendants' motion to dismiss, determining that the letters did  
7 not constitute an enforceable contract. 71 Wash. App. at 540, 861  
8 P.2d at 488.

9 The full legal description of the property was not contained  
10 in the letters. Instead, the offering letter referred to "Section  
11 27, southeast of Mt. Vernon." Indicating that the partial  
12 description would not satisfy the statute of frauds, the Washington  
13 Court of Appeals discussed the purchaser's argument that the  
14 letters constituting the contract could be reformed to include the  
15 full legal description. The court noted the general tenets of  
16 Washington law that agreements containing an inadequate legal  
17 description of property are void, but contracts can be reformed  
18 based on scrivener's error or mutual mistake. Id. at 542, 861 P.2d  
19 at 488.

20 The court cited Williams for the proposition that when an  
21 agreement contains an incomplete legal description, but it  
22 otherwise expresses the intent of the parties, it is not subject to  
23 reformation. Id. at 543, 861 P.2d at 489. The court then held  
24 that in the case before it, the legal description appeared to be  
25 "merely incomplete" and thus reformation was not appropriate. Id.  
26 The court went on to conclude that the statute of frauds was  
27 nonetheless satisfied when the sellers, claiming protection from  
28 the statute of frauds, admitted the legal description of the

1 property in court documents. Id. at 544-45, 861 P.2d at 490. The  
2 court then concluded that the terms of the contract were sufficient  
3 to find that the parties had a meeting of the minds. Id. at 547,  
4 861 P.2d at 491.

5 The Washington Supreme Court reversed on the meeting of the  
6 minds issue. 125 Wash. 2d at 126-27, 881 P.2d at 1038-39. It  
7 never discussed the issues of reformation and mutual mistake.

8 Plaintiff relies on the opinion from the Washington Court of  
9 Appeals to support her position that because, under her version of  
10 the facts, the Deed of Trust she executed omitted the legal  
11 description, it is not subject to reformation based on mutual  
12 mistake. But again, as in Williams, that is not the holding from  
13 the Court of Appeals case in Sea-Van because in Sea-Van, there was  
14 a partial legal description, not a completely omitted one, and  
15 thus, the legal description in the putative contract documents  
16 could be described as "incomplete," making it not subject to  
17 reformation. Here, either there was a legal description in the  
18 Deed of Trust at the time of signing which contained a clear error  
19 in the lot number (defendants' version of the facts), or the legal  
20 description was completely absent (plaintiff's version of the  
21 facts). Either way, as explained above in discussing Williams, the  
22 Deed of Trust is subject to reformation based on mutual mistake  
23 because it had a complete, but erroneous, legal description, or it  
24 had no legal description. It did not recite an incomplete legal  
25 description.

26 The last argument plaintiff makes in support of her request  
27 for reconsideration is that the August 24, 2005 Opinion & Order  
28 erroneously relied on Rogers v. Miller, 13 Wash. 82, 42 P. 525

1 (1895). Plaintiff contends that the case is no longer controlling  
2 because it predates the existence of Washington's nonjudicial  
3 foreclosure statutes. But, there is nothing in Rogers to suggest  
4 that the premise for which I cited it, that reformation based on an  
5 erroneous or omitted legal description may occur after a  
6 foreclosure, is limited to judicial foreclosures.

7 Having reconsidered the reformation issue decided in the  
8 August 24, 2005 Opinion & Order, I adhere to my initial ruling:  
9 the Deed of Trust is properly reformed based on mutual mistake and  
10 so reformed, it complies with the statute of frauds and  
11 appropriately set the foundation for the subsequent foreclosure  
12 proceedings.

### 13 III. Plaintiff's Motion to Amend

14 At oral argument on defendants' summary judgment motion,  
15 plaintiff orally moved to amend her Complaint to add a breach of  
16 fiduciary duty claim. I allowed plaintiff to file a formal motion  
17 to amend, which she did. Having considered the motion and  
18 defendants' response, I deny it.

19 In the proposed Amended Complaint, plaintiff's Eighth Claim  
20 for Relief is a breach of fiduciary duty claim against Fidelity in  
21 which plaintiff contends that Fidelity owed plaintiff "a fiduciary  
22 duty to use every requisite degree of diligence in conducting the  
23 sale of Plaintiff's property and to treat Plaintiff fairly."  
24 Proposed Am. Compl. at ¶ 70. Plaintiff contends that Fidelity  
25 breached its duty by conducting a nonjudicial sale of the property  
26 knowing that it did not have authority to do so, and knowing that  
27 the sale advertisements were not likely to attract bidders to the  
28 sale because of the mistaken lot number. Id. at ¶ 71.

1 Plaintiff further alleges that Fidelity breached its duty by  
2 deeding the property to Deutsche Bank by way of a Trustee's Deed  
3 containing false recitals. Id. at ¶ 72. Plaintiff contends that  
4 the Trustee's Deed falsely stated that the conveyance was pursuant  
5 to a Deed of Trust between plaintiff, Ticor, and Ameritrust when  
6 Fidelity knew that the actual Deed of Trust did not empower  
7 Fidelity to sell the property. Id. Plaintiff also contends that  
8 the Trustee's Deed falsely stated that Fidelity sold plaintiff's  
9 property to Deutsche Bank as the highest bidder as provided by  
10 statute. Id.

11 A. Standards

12 Federal Rule of Civil Procedure 15(a) provides that leave to  
13 amend a complaint "shall be freely given when justice so requires."  
14 The court should apply the rule's "policy of favoring amendments  
15 with extreme liberality." DCD Programs, Ltd. v. Leighton, 833 F.2d  
16 183, 186 (9th Cir. 1987) (internal quotation omitted). In  
17 determining whether to grant a motion to amend, the court should  
18 consider bad faith, undue delay, prejudice to the opposing party,  
19 futility of amendment, and prior amendments to the complaint.  
20 Sisseton-Wahpeton Sioux Tribe v. United States, 90 F.3d 351, 355-56  
21 (9th Cir. 1996). Delay, by itself, will not justify denying leave  
22 to amend. DCD Programs, 833 F.2d at 186.

23 B. Discussion

24 Defendants argue that plaintiff's motion should be denied  
25 because the proposed new claim is futile. I agree with defendants.  
26 Additionally, the timing of the motion to amend following the close  
27 of discovery and with a pending summary judgment motion, weighs  
28 heavily against allowing leave. Schlacter-Jones v. General Tel. of

1 Calif., 936 F.2d 435, 443 (9th Cir. 1991).

2       As with the other claims at issue in this motion, most of  
3 plaintiff's proposed breach of fiduciary duty claim has been waived  
4 due to plaintiff's failure to raise the claim as a defense to the  
5 foreclosure in an action brought before the foreclosure. Again,  
6 plaintiff had notice of the trustee's sale, had notice of her right  
7 to initiate an action to stop the foreclosure, knew of the basis of  
8 the breach of fiduciary duty claim before the sale, and failed to  
9 bring a pre-foreclosure action. As discussed above, this results  
10 in a waiver of her right to bring the claim now.

11       The only portion of the breach of fiduciary duty claim that  
12 could not have been brought as a defense to the foreclosure prior  
13 to the foreclosure is the allegation that Fidelity allegedly  
14 breached its fiduciary duty by making false recitals in the deed to  
15 Deutsche Bank. Because the deed to Deutsche Bank was executed  
16 after the foreclosure sale, plaintiff could not have raised an  
17 alleged irregularity in the post-sale deed in a pre-sale action.

18       The first recital challenged by plaintiff is one that Fidelity  
19 had authority to convey the property when it did not. The  
20 discussion above regarding the Appointment of Successor Trustee  
21 shows that Fidelity did indeed have authority to conduct the sale  
22 and convey the property. Exh. 13 to June 20, 2005 Cotter Affid.  
23 Thus, any alleged breach of fiduciary duty based on an alleged  
24 false representation about Fidelity's authority, or lack thereof,  
25 to convey the property at the foreclosure sale, is not supported by  
26 the evidence and it would be futile to amend the Complaint to add  
27 such a claim.

28       The second recital challenged by plaintiff concerns the

1 representation that Fidelity conveyed the property to Deutsche Bank  
2 in consideration for payment of \$183,506.02. Id. Plaintiff  
3 contends that the recital is false because Deutsche Bank was not a  
4 bidder at the sale and did not pay for the property in the form of  
5 cash, certified check, money order, or funds received by verified  
6 electronic transfer, or any combination of these methods, as  
7 required by RCW 61.24.070(2).

8 Washington law provides that the beneficiary under a Deed of  
9 Trust may bid at the trustee's sale. RCW 61.24.070(1). The law  
10 further provides that the "trustee shall, at the request of the  
11 beneficiary, credit toward the beneficiary's bid all or any part of  
12 the monetary obligations secured by the deed of trust." RCW  
13 61.24.070(2). "If the beneficiary is the purchaser, any amount bid  
14 by the beneficiary in excess of the amount so credited shall be  
15 paid to the trustee" in one of, or in a combination of, various  
16 specified forms. Id. If the purchaser is not the beneficiary, the  
17 entire bid is to be paid to the trustee in one of, or in a  
18 combination of, various specified forms. Id.

19 On January 9, 2004, Ameriquest, the designated beneficiary  
20 under the original Deed of Trust, submitted its bidding  
21 instructions for the sale. Nicolia Godfrey Affid. at ¶ 3; Exh. 1  
22 to Nicolia Godfrey Affid. The instructions allow for a bid of up  
23 to \$183,506.02, the outstanding amount of the loan. Id. The  
24 instructions further provide that if the "property reverts, please  
25 take title in the name of our investor as follows: Deutsche Bank  
26 National Trust Company, As Trustee Of Ameriquest Mortgage  
27 Securities, Inc. Series 2002-D, Asset-Backed Pass-Through  
28 Certificates, Under the Pooling & Servicing Agreement Dated as of



1 December 1, 2002, Without Recourse." Id. At foreclosure, as a  
2 result of this bid, the property reverted back to the beneficiary  
3 Deutsche Bank for the \$183,506.02 owed on the outstanding loan.  
4 Nov. 9, 2005 Supp'l Gaby Ospino Affid. at ¶ 3; Exh. 1 to Nov. 9,  
5 2005 Supp'l Gary Ospino Affid. The amount paid for the property at  
6 foreclosure was not in excess of the amount credited. Thus, there  
7 was no requirement of payment to the trustee under RCW  
8 61.24.070(2). Plaintiff cannot sustain a breach of fiduciary duty  
9 claim based on an alleged false recital in the trustee's deed to  
10 Deutsche Bank regarding "payment" by Deutsche Bank or regarding a  
11 violation of RCW 61.24.070(2). Therefore, allowing plaintiff to  
12 amend her Complaint to add such a claim would be futile.

13 CONCLUSION

14 Defendants' motion for summary judgment (#77) is granted.  
15 Plaintiff's motion to amend (#98) is denied. Plaintiff's request  
16 for reconsideration is denied.

17 IT IS SO ORDERED.

18 Dated this 22nd day of December,  
19 2005.

20  
21 /s/ Dennis J. Hubel

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23 Dennis James Hubel  
24 United States Magistrate Judge  
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